90-1809

Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

CITY OF CHICAGO, A Municipal Corporation, Plaintiff

and

JOAN P WHITMER,
Petitioner

v

JOHN HANCOCK MUTUAL LIFE INSURANCE CO.,
SUDLER & CO., and HOMEOWNERS ASSOCIATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

Joan P Whitmer
Petitioner
American Citizen on her own behalf
221 Partridge Place, DeKalb IL 60115
815/758-7272
May 1991

LAWthority® May 1991

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QUESTIONS PRESENTED

Whether the courts have a right to force Petitioner back into the courtroom

- without the right to have the defendants' file a proper answer to her complaint the case below;
- without the right and the time for discovery;
- with orders to go to trial with an unreal, unfair, prejudicial time limitation;
- with her issues so improperly limited and defined, that she will not gain the relief she sought by intervention eight years ago,

with utter violation of her constitutional rights to due process, equal protection, and equal access to the courts.

LIST OF PARTIES

The parties are the same as those listed in the caption of this petition.

Joan P Whitmer is an individual, a non-attorney, plaintiff-petitioner, on her own behalf, and a private citizen. She was secretary of the condominium association's engineering committee and an original complainaint of the health and safety violations in the John Hancock Center in Chicago. She was the Plaintiff-Intervenor-Appellant in the courts below.

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PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

Petitioner Joan P Whitmer respectfully asks that a petition for writ of certiorari issue to review the order of the Illinois Appellate Court, entered in the above entitled proceeding on June 29, 1990.

OPINIONS BELOW

The December 4, 1990 order by the Illinois Supreme Court is not reported. The Illinois Supreme Court denied the petition for leave to appeal. (#70773)

The June 29, 1990 order of the Illinois Appellate Court, First Judicial District, Fifth Division, by Justices Michael A Coccia, Francis A Lorenz, and James J Murrary is not reported. It is provided as Appendix B. (note: there is no appendix A.)

The August 16, 1990 order of the Illinois Appellate Court, First Judicial District, Fifth Division denied Petitioner's July 23, 1990 Motion for Leave to File Instanter her Petition for Rehearing.

JURISDICTION

The jurisdiction of this Court is conferred under 28 USC § 1257(3).

> ***State courts; appeal; certiorari.***
> *Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * **
> *By writ of certiorari, where the validity of a . . statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under*

the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment of the United States Constitution:

> *"No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."*

and the Fourteenth Amendment to the Constitution of the United States, Section One:

> *". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

On February 20, 1990 Petitioner made a timely application to Associate Justice John Paul Stevens for an extension of time to file her petition for writ of certiorari. Justice Stevens' February 21, 1991 order extended the time for filing to and including May 3, 1991. (Number A-639.)

However, the United States Court of Appeals for the Seventh Circuit scheduled the same May 3, 1991 for the filing of Petitioner Joan P Whitmer and her husband Frank L Whitmer's brief and short appendix in their joint appeal #90-2888 in that court. Petitioner Joan P Whitmer had notified that court and personally filed at 9:00 the morning of April 22, 1991 a motion to stay or delay proceedings in that court so as to not conflict with the filing in this Supreme Court of the United States on that date.

Unfortunately, when the United States Court of Appeals for the Seventh Circuit reinstated plaintiffs-appellants' appeal in that court on April 25, 1991, after a dismissal upon defendants' misleading motion, they specifically ordered briefing also on May 3, 1991.

Petitioner asked for a stay of the United States Court of Appeals for the Seventh Circuit briefing demand by this United States Supreme Court on April 29, 1991 (number A-822 that is still before this court) because of the prejudicial impossibility of preparing two briefs within five working days on the same day. This has terribly prejudiced both the preparation of this Petition for Writ of Certiorari and that United States Court of Appeals for the Seventh Circuit brief on the merits.

STATEMENT OF FACTS AND THE CASE

Petitioner was a citizen complainant to the City of Chicago about the inadequate ventilation and pollution in her apartment in the John Hancock Center in the City of Chicago.

The Chief Mechanical Equipment Inspector of the Department of Inspectional Services for the City of Chicago, and an inspector inspected her apartment, the corridors and the parking garage at the John Hancock Center.

They found it to be lacking in proper code required, minimum ventilation, both natural and mechanical. On July 22, 1983 the City of Chicago, based upon Petitioner's complaint to them, filed its complaint and suit against defendants John Hancock Mutual Life Insurance Company, Sudler & Co and 175 East Delaware Place Homeowners Association. The City's complaint alleges that *the defendants were required, but failed to maintain and operate the ventilation system in the John Hancock Center in accordance with the minimum specifications mandated by the Municipal Code of the City of Chicago.*

On December 2, 1983 the City of Chicago filed an amendment to its complaint stating *that every window, other than a fixed window, shall be capable of being easily opened and shall be held in position by window hardware.* The existing *"windows"* in the residential portion are not truly operable windows. They are emergency access panels and never had the hardware needed for them to be opened by the residents. To this date as far as Petitioner knows, the *"windows"* require a *screwdriver* to open or to lock them closed, in clear violation of Section 78-53(c) of the City of Chicago's Municipal Building Code and the minimum mandatory health and safety requirements

To remedy these violations, the City asked that the Court levy a fine for each days violation, enter a temporary and permanent injunction, appoint a receiver to bring the property into compliance with the Municipal Code of Chicago, and/or order demolition of the building. (1R C5)

Injunctive relief was sought because *"William L Duggan, the duly appointed Commissioner of Inspectional Services, City of Chicago, has determined said building to be dangerous and unsafe or uncompleted and abandoned."* (Id.)

Since the City of Chicago made no legal effort to inspect any other unit, and had done no discovery whatsoever, Petitioner asked her attorneys, Jenner & Block, to file her verified petition for intervention with her verified complaint.

On August 30, 1983 her attorneys filed a petition for intervention in this lawsuit. (1R C26). Petitioner pleaded ownership of a unit (8504) in the Hancock Center which her family and Petitioner were unable to occupy, because the defendants failed to provide adequate ventilation. (1R C27, 28b)

In the verified complaint filed as Intervenor (1R C28a) Petitioner alleged Petitioner was the owner of unit 8504 in the Hancock Center in Chicago, Illinois (1R C28b) and further alleged occupancy of the unit from August 31, 1977; and continuously from March 14, 1979 to June 22, 1981,

when "*for reasons of family health, she was forced to change her residence.*" (Par 3, 1R C30).

This Verified Complaint, in part, adopts the City's allegations of violations. However, her complaint is specific to the contamination of her unit in the same building, plus a more inclusive charge pertaining to the entire ambient atmosphere not only of the public places, but of the general pollution throughout the entire plant. Petitioner's interest is substantially different from that of the Homeowners Association. Petitioner has been effectively evicted from her home by the failure of the defendants to remedy the ventilation defects. The danger to her health, as well as that of her family, and the urgency of her interest in seeing that the ventilation defects in the John Hancock Building are corrected, are clearly alleged in her Verified Petition for Intervention and Verified Complaint. See Verified Petition for Intervention, Paragraphs 4, 6, 7; Verified Complaint, Paragraph 3. The fact is that Petitioner moved to protect her health and her family's health. However, even though no one has occupied her unsafe apartment for almost ten years, Petitioner still pays all taxes, mortgage, expenses, assessment and maintenance for her unit.

The violations of law forcing her out of her unit "*include, but are not limited to, those stated in* [the City's] *complaint in this action.*" (Par. 6, *id.*)

Petitioner prayed for a declaration that the building was in violation of the Municipal Code, Par 11-13-15 (Ill Rev Stat ch 24); and a mandatory injunction on the defendants to abate the violations (1R C30).

Petitioner's Verified Petition to Intervene alleges in pertinent part that as an owner of a condominium unit in the building, Petitioner had a direct interest in this City suit because she was the person who initiated the city complaint and whose health, safety, and property interests were directly threatened by the actions of the defendants in permitting the

building to remain without adequate ventilation since it was built in 1969.

The trial court (Hon. Simon S Porter) denied Petitioner Joan P Whitmer leave to intervene on September 13, 1983. Immediately following the trial court's denial of her petition for intervention, Jenner & Block filed a notice of appeal on her behalf on September 14, 1983. (1R C134). On August 17, 1984 the Appellate Court ordered Joan P Whitmer's intervention as a plaintiff *as of right without any restriction.* 127 Ill App 3d at 140. Rehearing denied, *id.*, at 148.

The Appellate Court reversed the denial of intervention, rejecting the parties' (City, Hancock and Homeowners) arguments of adequate representation. (*id.*, at 148) "* * *, *the letter and spirit of the statute can only be advanced by allowing intervention in this case.*" (*id.*, at 150)

On March 22, 1985 the mandate of the Appellate Court directed that Petitioner was then a Plaintiff-Intervenor.

While her appeal for intervention was pending, party pleadings, papers, orders, and motions were filed (1R C135 to C265). The time was from September 13, 1983 (order denying intervention) to March 22, 1985 (mandate to Circuit Court). (See orders: 1R, C206; C227-29; C260-61; C262-63) all affecting the basic issues of the complaints; none of which improved conditions in the building; or advanced the case; or, resolved an issue or issues.

While the appeal was pending, the circuit court case proceeded. Three major orders were entered during this period.

John Hancock Mutual Life Insurance Company and the City of Chicago entered into an agreed, stipulated, consent decree for the garage parking ventilation. (Transcript of Proc Jan 11, 1984, p 4, 5, 33, 35.) The order was entered January 17, 1984. (C 227.)

Two additional orders were entered June 8, 1984 (C 260, 262.) One affected mechanical ventilation, the second stated the *"windows"* were openable and operable. At the May 22,

1984 hearing, the City stated the approved orders were the result of a pre-trial conference—the City and defendants had come to a basic agreement but were still hassling over the form of the order. (Transcript of Proc May 22, 1984 p3.)

One June 8, 1984 order was for the mechanical ventilation for the condominiums (it is a central system) which stated:

"It appearing . . . " and *"It further appearing . . . and that there has been no trial of the matters alleged in the Complaint as to the ventilation system, and that there have been no finding of fact or conclusion of law or adjudication made . . ."* (C 262)

Petitioner was not yet an Intervenor and had no input or standing in the drafting of any of these orders. The court and defendants proceeded in spite of the pending intervention and her pending Complaint.

At two separate hearings the trial court judge stated:

"you may have an action against John Hancock or even against the city for malfeasance." (March 7, 1984 transcript page 185.)

"they may have an action against the city - - they may have an action against the builders, . . ." May 2, 1984 transcript page 21.

On May 2, 1984 the law firm of Wilson & McIlvaine announced to the court its appearance as additional counsel for defendant 175 East Delaware Place Homeowners Association. That law firm, now Burke Wilson & McIlvaine, has represented all three defendants since that time.

When the mandate came down on March 22, 1985, Petitioner's rights to be heard and to have relief were clearly established.

City of Chicago and Joan P Whitmer v John Hancock Mutual Life Insurance Company, Sudler and Company, and Homeowners Association. 127 Ill App 3d 140, 468 NE 2d 428.

Supplemental Opinion on Denial of Rehearing September 28, 1984. Denial of Leave to Appeal by Illinois Supreme Court February 5, 1985. (id., 101 Ill 2d 588.)

After the mandate granting intervention on March 22, 1985 (C 265), no orders or pleadings until October 10, 1985 are shown in either the defendants own chronology (p25 following C1024) or the Record on Appeal. However, defendants were insistently and aggressively deposing her consulting experts, and everyone was trying to force Petitioner into a settlement that would barely cover the value of her condominium, and without the health information the physicians insisted they needed.

Counsel withdrew on October 10, 1985 (1R C267-72) over her written objections. (1R C273-275). On November 13, 1985 the appearance of new counsel was filed for Petitioner. (1R C279).

Defendants proceeded, over her objections, to depose her consultants, while Petitioner received no discovery in return. (C 283, 285) Her interrogatories remain unanswered. Defendants' answers, if any, to her interrogatories are not in the record.

On December 23, 1986 an order was entered with a preface stating, "*This cause coming to be heard on the date set for a pre Trial Conference,*" and, concluding with the words "** * * is continued for a status hearing on January 20, 1987.*" (1R C305)

On January 20, 1987 the case was accelerated. Then on January 21, 1987 her attorney withdrew as her counsel without notice and over her objections. (2R 317-18). Petitioner was given only one week by court order to obtain "*new counsel.*" (1R C287).

Petitioner's legal fees and expenses have exceeded one-hundred thousand dollars, without discovery and without achieving anything but the *illusion* of intervention.

Petitioner has been without counsel since that date and has objected and continues to object to the improper withdrawal of counsel in violation of Illinois Supreme Court Rule 13, the Code of Professional Responsibility 2-110 and Cook County Circuit Rule 1.4, and the statutes.

On March 11, 1987, without discovery or participation, a *"trial"* was held on the single issue of converting the emergency access panels to openable and operable "windows."

She filed her notice of appeal April 10, 1987 in objection to the trial court's proceedings.

The subsequent Appellate Court order *"narrowed the issue in appeal number 87-1211 solely to the propriety of the March 11, 1987, order . . ."* (B6) and the Appellate Court thereby improperly restricted her *unrestricted intervention as of right*, contrary to the Illinois intervention act provisions such as Section 2-408(f).

July 20, 1990, Friday, was the due date of the Petition for Rehearing. However, extreme illness of Petitioner's husband compelled the filing of her Motion to Extend Time to File Petition for Rehearing due to *"extreme and compelling circumstances."* It was timely mailed Friday, July 20, 1990. Petitioner was then able to file her Petition for Rehearing that next Monday, July 23, 1990 but on August 16, 1990 the Appellate Court denied Plaintiff-Intervenor-Appellant's Motion for Leave to File Instanter Petition for Rehearing. (The order did not refer to the timely July 20, 1990 "Motion to Extend Time to File Petition for Rehearing" which was never ruled on.) Her subsequent petition for leave to appeal to the Illinois Supreme Court was denied on December 4, 1990.

REASONS FOR GRANTING THE WRIT

Intervention

It is a matter of record that the City as plaintiff, and the Association as defendant, were inadequate in their purported representation—that Petitioner had her own interest in her health, in her atmosphere, in the correction of the defects in the building and in her determination for self protection. (See 147 Ill App 3d at 145.)

Petitioner could have instituted her own action or proceeding but chose instead to file her Complaint with the suit filed by the City of Chicago, as a proper intervention. By statutory requirement there are two complaints filed in this case—first, the one filed by the City of Chicago on July 22, 1983; second, the verified one filed by Joan P Whitmer on August 30, 1983 and mandated by the Appellate Court on March 22, 1985 without restriction, as of right. It is separate and distinct from the City of Chicago's case against the defendants. Petitioner's case is a separate and distinct cause of action of defendants' wrongs against her.

The law requires that a separate complaint be filed by a prospective intervenor. Until Petitioner's apartment is fit for her to live in, Petitioner is deprived of her property without due process of law.

Petitioner Joan P Whitmer was granted leave to intervene in the lawsuit as a matter of right, without restriction, by an opinion of the Appellate Court First District rendered on August 17, 1984.

The Appellate Court, in granting intervention to Petitioner under *Ill Rev Stat (1983) ch 110, ¶ 2-408(f), (Illinois Code of Civil Procedure § 2-408(f))*, stated,

> *"[w]e hold that the trial court erred in denying the petition to intervene. * * * the order of the circuit court is reversed and this cause is remanded for further proceedings."*

It is these *"further proceedings"* which the trial court then constantly refused to enforce.

Following the granting of Complainant and Plaintiff-Intervenor Joan P Whitmer's original intervention, as of right, without restriction, the Illinois trial court, plaintiff City of Chicago, and the defendants continually denied and prevented Petitioner's active participation, her representation by counsel, any discovery, did not answer her complaint or permit its amendment, and refused to act upon her motion to default the defendants for failure to answer her complaint.

Therefore, upon order and stated termination of the proceedings on March 11, 1987, Petitioner filed another appeal on April 10, 1987.

However, in this second appeal (87-1211) the appellate court, in ordering *"further proceedings"* has denied and restricted this Petitioner from the right to the *"further proceedings"* of her complaint.

The June 29, 1990 Appellate Court order is redefining the intervention statute by limiting her to the March 11, 1987 order.

The Appellate Court cites Section 2-408(f) of the *Illinois Code of Civil Procedure* in its opinion (B9):

> *"An intervenor shall have all the rights of an original party, except that the court may in its order allowing intervention, whether discretionary or a matter of right, provide that the applicant shall be bound by orders or judgments, theretofore entered or by evidence theretofore received, that the applicant shall not raise issues which might more properly have been raised at an earlier stage of the proceeding, that the applicant shall not raise new issues or add new parties, or that in other respects the applicant shall not interfere with the control of the litigation, as justice and the avoidance of undue delay may require."* (Emphasis added.)

The Appellate Court's June 29, 1990 order is not permitting Petitioner to intervene in the manner prescribed by the statute. No restrictions were placed on Petitioner by that Court when it originally granted her intervention. That was the only time, according to statute, that that Court could have restricted the scope of her intervention. That was the only time either Court could have done so. Neither the trial court or the Appellate Court restricted her intervention at that time. It is a denial of due process for either court to attempt to restrict Petitioner now. That opportunity was passed by both the trial and appellate courts, but now this Appellate Court is going back to restrict the intervention, years after it was originally granted. This is manifestly unfair, prejudicial and contrary to the intent of the intervention statute. **It is therefore a denial of due process.**

The Illinois Appellate Court, in its June 29, 1990 order in this appeal, again reversed the trial court order appealed from, finding in Petitioner's favor, and stated:

> *"Once this court recognized Whitmer's right to intervene, it was incumbent upon the circuit court to follow our mandate and allow her to participate fully in the case on remand."* * * *
> *"and remand the cause for a hearing on the merits of her complaint."*

However, the Illinois Appellate Court, in violation of the Illinois intervention statute as well as the Illinois Supreme Court Rules and the Illinois Civil Practice Act, then contradicted that statement by ordering a stricture to be enforced which denied her all of the foregoing.

> *"35 days to retain new counsel, * * * evidentiary hearing shall be held 35 days thereafter"* (B10)

This order does not permit Petitioner to develop her case, properly participate in the proceedings, and be heard on her

issues and on her inquiries. (*Caterpillar Tractor Co v Lenckos*, 77 Ill App 3d 90, 96; 395 NE2d 1167; aff'd 84 Ill 2d 102; appeal dism, 463 US 1220).

It is now this Appellate Court, not the trial court, which is placing the restrictions on the intervention after the appeal was filed April 10, 1987. It is wrong for the Appellate Court to now put limitations on the rights of the intervenor.

> *"The guaranty of due process of law requires that every man shall have the protection of his day in court and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society (Citations) * * * The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case."* (*City of Chicago v Cohn*, 326 Ill 372, 374-375; quoted in *Pettigrew*, 67 Ill App 2d 344, 350). (Emphasis added.)

In a prelude to that quotation the Court said:

> *"procedural aspects of due process and equal protection of the laws require that a person be given * * * an opportunity to be heard"* and to present her case *"in an orderly proceeding adapted to the nature of the case."* (*Pettigrew v National Accounts System Inc.*, 67 Ill App 2d 344, 350.)

In specifying the scope of due process in litigation, the court explained:

> *"A fundamental requisite of procedural due process is that every man shall have the protection of his day in court and the benefit of an orderly proceeding according*

to the general law or established rules; and that the hearing shall not be arbitrary, but rather shall afford to him an opportunity to be heard

* * *

and shall assure to him an inquiry on the issues of the case, wherein judgment is rendered only after trial. There must be an intrinsic fairness of procedure by which any judgment, order or decree is rendered. This is essential to the untainted administration of justice›the most cherished aspect of our judicial system." (*id.*, at 351)

In each aspect of this case the administration of justice is tainted by a failure to observe those safeguards quoted above.

"Tested by these standards, we find that appellants were not afforded the due process guaranteed them by our Constitutions. What is, or is not, a denial of due process does not readily lend itself to any refined definition, but it can be rendered progressively more clear by the course of litigation. Where, however, the procedure followed by a court is so lacking in a principle or principles basic to our system of justice that it offends the system, that procedure must be condemned as a denial of due process." (*id.*, at 351)

Meaningful due process has been denied Petitioner. The intervenor has a right to a fair hearing on the issues, these untimely restrictions will deprive her of that right and preclude effective presentation of the her interest.

"*Sub rosa*" restriction has been placed on Petitioner (intervenor). It is unconstitutional under Section 2-408(f), and due process of law. By limiting the issues, in effect the appellate court is binding Petitioner to the earlier trial court orders entered prior to the granting of intervention in March, 1985 and contrary to the intervention statute and the appellate court's earlier opinion granting intervention as of right without restriction. Had the appellate court originally

restricted her, she could have appealed the restriction and/or decided not to intervene at that point instead of wasting time and money. She could have filed an independent suit and/or a post judgment intervention. The appellate court has denied her the protections of the statute in violation of due process, equal protection, and equal access to the courts.

> *" . . . it hardly comports with good administration, if not due process, to determine the merits of a claim asserted in a pleading seeking an adjudication through an adversary hearing by denying access to the court at all."*
> *Atlantis Development Corp v United States*, 379 F2d 818, 827.

By placing a mandatory 35 day period, Petitioner is, in effect, being denied access to the court.

It is a violation of due process to now apply any restrictions. Petitioner should be allowed to fully develop her case. At this late date the June 29, 1990 Appellate Court order is redefining the intervention statute, and its own original opinion in 1984, by limiting Petitioner to litigation of the March 11, 1987 order only, which deals only with window hardware. Petitioner is being denied the full proper scope of her intervention.

What the Appellate Court's order has done, almost five years after it originally granted intervention, is to now **limit** that intervention, just as the trial court did. Petitioner is entitled to be heard on all the issues, not just what's left over, i.e, the shreds of the March 11, 1987 non-order on *"window"* hardware.

Petitioner's unanswered verified complaint did not limit itself to just *"tin-foil"* window hardware which is of little or no value in making her apartment less contaminated. A § 2-408(f) order is relevant with multiple parties-plaintiff. It has no justification when there is a single plaintiff presenting a single issue.

No issues were decided in the March 11, 1987 order. It only said provide the hardware, and it did not state that properly to be enforceable, giving the unit owners (non-parties) the *"option" of complying with a mandatory minimum health, safety and welfare code.* The hardware is just one small segment of the problem—pollution is the health problem—and continuing non-compliance with the City of Chicago ventilation codes. The Appellate Court order expressing no opinion about the March 11, 1987 order, is in effect ignoring it.

"As we express no opinion regarding the merits of the March 11, 1987 order." (B10)

Petitioner has a right to rely on the clear purpose of the Intervention Act as expressed by the Joint Committee Comments [1955] to the Act.

"Intervention is frequently desirable to allow a person to protect an interest jeopardized by pending litigation to which he is not a party . . ."

If statutory language is certain and unambiguous, the proper function of the court is to enforce the statute as enacted. *Waste Management v Environmental Protection Agency,* 137 Ill App 3d 619, 484 NE2d 1128.

A statute will not be construed so as to lead to absurd, inconvenient or unjust consequences.

In re Application of Walgenbach, 104 Ill 2d 105, 470 NE2d 997,

and in the same vein,

*Consumer Product Safety Comm'n v GTE Sylvania Inc.*447 US 102, 108, 100 S Ct 2051, 2056, 64 Led 2d 766.

Order Not Provide Relief Sought in Complaint.

The March 11, 1987 trial court order does not give Petitioner the relief she sought in her verified complaint. The order fails to even recognize the issues of Petitioner's complaint and certainly has nothing to do with cleaning up the environmental pollution of Petitioner's condominium

apartment. Properly interpreted, "condominium apartment" includes the whole building as stated in Petitioner's complaint. To clean up Petitioner's apartment it is necessary to clean up the entire building.

Additionally, a stipulation between the original parties does not bind intervenors who came into the case afterward. *Kneeland v Luce*, 1891, 12 S Ct 39, 141 US 437, 35 Led 808. Any orders entered prior to March, 1985 were stipulated orders. This Petitioner officially came into the case when her intervention was granted in March, 1985. Therefore she is not bound by the early orders and should be able to address them.

The rule precluding review of a consent order does not apply if there exists an equitable basis for vacating the order, e. g., fraud. *Hill Behan Lumber Co v First National Bank of Woodstock*, 95 Ill App 3d 426, 420 NE 2d 268.

Joan P Whitmer has been unconstitutionally denied Due Process of Law, Equal Protection of the Law, and Access to the Courts by either the improper acts of prevention of actual intervention by the trial court, or the by Act itself, and so pleads.

Petitioner is about to be given a "hearing" but is deprived of the right to be heard fully and fairly on the merits of her unanswered, unrestricted, verified complaint in intervention.

Ambiguous Commands

The opinion itself is totally unclear. On one hand the Court says *"participate fully"* and on the other hand it severely limits:

- the issues,
- pleadings,
- amendment,
- discovery,
- preparation and scope of trial.

Petitioner's rights are taken away to prosecute her case. How does she *"participate fully"* when her hands are tied and she is not given time for:

- discovery
- legitimate litigation procedures
- illness
- unanticipated contingencies.

The Appellate Court's order makes no provision for default, nor for time for default, or for the problems of default—or for an answer to Petitioner's unanswered complaint by any of the parties.

The appellate court attests to the *"complexity of the case."* (B9) Yet it does not take this *"complexity"* into consideration in its strict time requirement for circuit court scheduling. Petitioner is deprived of the ability to *"participate fully in the case on remand"* **It is therefore a denial of due process of law.**

Denial of discovery procedures

Petitioner is being precluded from, and denied time for and the right to discovery. Where is there time for depositions, interrogatories, admission of facts or genuineness of documents? Under Illinois Supreme Court Rules 213(c) and 216(c) defendants would have 28 days in which to respond to this discovery. Even assuming they would answer fully rather than object, only seven days would remain to prepare for trial.

In effect, the appellate court stresses due diligence, but then proceeds to again send Petitioner (or her attorney) into battle again in the trial court without time to assemble evidence. The time restrictions do not give an opportunity to open up the case of contamination. It is therefore a denial of due process of law.

The City of Chicago had the very minimal discovery they wished, and the defendants had over four years to do all that they wanted.

The appellate court order deprives Petitioner of the benefits and protections of the mandatory Supreme Court Rule 220. The disclosure of an expert at least 60 days before commencement of trial is mandatory, regardless of whether the trial court issues an order establishing a schedule for

disclosure, and even though a 90 day period has not elapsed from the time the party learns the substance of his expert's opinion. *Klingler Farms v Effingham Equity,* 171 Ill App 3d 567, 525 NE 2d 1172, 1175.

The key word is mandatory. *Harold Meyer v Caterpillar Tractor Company,* 179 Ill App 3d 268; 533 NE 2d 386, 395.

> *"Upon remand, the circuit court shall also permit Whitmer 35 days to retain new counsel. . . . "The evidentiary hearing shall be held 35 days thereafter."* (B10.)

Yet Illinois Supreme Court Rule 220 clearly states:

> *"Expert Witnesses. **Disclosure: Expert witness.** Where the testimony of experts is reasonably contemplated, the parties will act in good faith to seasonably:*
>
> *. . . In order to insure fair and equitable preparation for trial by all parties the identity of an expert who is retained to render an opinion at trial on behalf of a party must be disclosed by that party either within 90 days after the substance of the expert's opinion first becomes known to that party or his counsel or, if the substance of the expert's opinion is then known, at the first pretrial conference in the case, whichever is later."*
>
> * * *
>
> *"The schedule established by the trial court will sequence the disclosure of expert witnesses in accordance with the complexities of the issues involved and the burdens of proof of the respective parties as to those issues. All dates set by the trial court shall be chosen to insure that discovery regarding such expert witnesses will be completed not later than 60 days before the date on which the trial court reasonably anticipates the trial will commence." . . . failure to make the disclosure required by this rule . . . will result in disqualification of the expert as a witness."* (Emphasis added.)

Due Process and Equal Protection

"No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

Constitution of the State of Illinois 1971
Article I, Bill of Rights, Section 2

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States
Amendment XIV, Section 1

The appeal had been made almost impossible from inception because defendants consistently refused to approve or cooperate in bystanders reports under Illinois Supreme Court Rule 323. The courts did not help whatsoever—even though almost all of the transcripts of the hearings were missing for the period when she was represented by counsel and obviously not privy to the proceedings. Petitioner had been trying diligently for over a year to get what she considered the critical transcripts and never succeeded. Later, after an ex parte conversation by the court reporting firm, the Illinois Appellate Court determined without substantiation that the transcripts and tapes had been *"burglarized and vandalized."*

Everything possible was made difficult, even the pre-trial conference totally violated Supreme Court Rule 218(b) without an order reciting any action taken by the court and the agreements made by the parties as to any of the matters considered, and which specifies as the issues for trial those not disposed of at the conference.

Petitioner's appeal was not fully briefed and argued. Defendants violated Illinois Supreme Court Rules

341(e)(6)(7) and 341(f), by filing a brief that lacked any citations to the voluminous record. (Appendix B7) Petitioner had to file objections, moved to strike defendants' brief and asked for an extension to wade through their citation-absent brief and appendix of 165 pages. She had only six days left. Even so, the court denied her motion. She was unable to finish her reply brief in time and it was never filed. Actually, the court thereby punished her for defendants' willful breach of the rules.

Petitioner has been unable to amend her motions for sanctions, to have them heard, and never waived her rights to pursue that relief.

Petitioner has also been unable to determine who is a party and any such determination has been refused to her in spite of the extreme conflicts of interest.

Right to Remedy and Justice

"Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy or reputation. He shall obtain justice by law, freely, completely, and promptly."

Constitution of the State of Illinois 1971
Article I, Bill of Rights, Section 12

"No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment V

DISCRIMINATION

Unequal Demands against pro se non-attorney.

This Petitioner is being treated differently than attorneys and represented plaintiffs without any constitutional sanction for the difference in treatment. Instead of granting time and

scheduling the case as spelled out in the Supreme Court rules and trial court discretion, she and the trial court are locked into a shorter, tortured time frame of 35 days. (B10).

Petitioner, a non-attorney pro se person, is held to the same standards as an attorney and the trial court judges have so stated: yet she is not given the protections, benefits and privileges of an attorney.

The courtesies and protections extended to attorneys virtually automatically are being denied to Petitioner. Lawyers get discovery. Lawyers have no trouble getting continuances when there are reasons and the Supreme Court Rules so provide. Why is this Petitioner being deprived of these protections and penalized? This is a severe penalty with a denial of right to due process, equal protection and equal access to the courts.

Diligence in the prosecution of this lawsuit is desirable and Petitioner certainly objects to *"undue delay."* However, due process requires that she receive the latitude given to all litigants to develop her case in a reasonable time, not on an arbitrary, plucked out of the air time schedule that does not allow the trial court to control its own docket, provide for contingencies and is completely artificial.

Unequal Demands—Hearing Handicap.

> In spite of the appellate court's stated recognition of her *"disability and the complexity of the case"* it set specific time limits, even shorter than those allowed by the mandatory Supreme Court Rules. *evidentiary hearing shall be held 35 days thereafter"* (B10)

Unequal demands are being made on Petitioner as a non-attorney pro se plaintiff, with a hearing handicap recognized by the court in its order. The Court plunges her into a schedule that would give trouble to a practicing attorney with a good set of ears. She is expected to pursue her case with stringent, prejudicial, unrealistic time and procedural

limitations as a non-attorney pro se plaintiff, with a severe hearing handicap in a denial of due process of law.

The court's June 29, 1990 order recognized Petitioner's hearing handicap stating:

> *"Whitmer brought her hearing disability to the circuit court's attention before the March 11, 1987 trial as stated above. (In this court, Whitmer has filed an affidavit executed by a physician, documenting her handicap.) . . . Given Whitmer's complexity of the case . . ."* (A9)

However, the appellate court reduced the amount of time for Petitioner to prepare her case. Their action is certainly not *"equal to."* This is a violation of due process, equal protection of the laws and equal access to the courts.

Petitioner has no other adequate means to secure the desired relief, and will be damaged or prejudiced in a way not correctable upon remand to the trial court because of the specific limiting of issues to be heard and time frame required by the appellate court. The trial court is required to follow the appellate court's mandate.

Petitioner is suffering from a severe hearing and speech discrimination loss far exceeding the Social Security Administration 40% level as 36 and 32%. As a consequence her work is more labored, much slower and takes far more time. It is also slower in communicating during research, by telephone, and other relationships that the non-hearing-handicapped take for granted. Hearing loss is a recognized barrier to communication and understanding. Most courts today still deny equal access and due process to hearing-impaired people. The court schedule demands on a non-attorney pro se with such a deficit means that petitioner needs time, meaningful time, for there are no short cuts for her. She has no one she can assign the work to. Her diligence has been no help and she has been cut off from the helpful and necessary conversations and discussions of legal matters that a pro se, non-attorney party must have in such a complex case. Petitioner is disabled, handicapped, and entitled to the

protections of the *Rehabilitation Act of 1973* such as § 504, and 29 USC § 794, which are being denied to her by the appellate court.

The compounding of these disabilities results in a devastating multiplicative effect on the individual. For example, a hearing impaired person is not only hindered by his or her hearing loss but also by the complications which result. The loss of communication will further impair the person's communication skills, and so on in a destructive cycle.

The most significant principle of the Rehabilitation Act for the handicapped is that no recipient or Federal agency may deny, on the basis of handicap, a qualified person an opportunity to participate in or benefit from its programs or services. I expect that the courts and justice qualify as opportunity, participation and benefit.

A handicapped person must be given an opportunity to participate in or benefit from a program in a manner that is equal to and as effective as the opportunity provided to non-handicapped people.

> *"No other qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason on his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance."*

Section 504 of the Rehabilitation Act of 1973, quoted above, and the comprehensive regulations implementing it, exemplify the fact that the law no longer relegates handicapped persons to second class citizenship. The 1970's have ushered in a new era of acceptance for the disabled. Each year finds courts more willing to establish and define the constitutional rights necessary to secure a handicapped person equal stature in society. Congress has responded by codifying these rights and making equal treatment among the

disabled and non-handicapped a legal mandate. The challenge now is implementing these laws.

The law has taken great strides in raising the handicapped to the same plain occupied by the nonhandicapped. Federal court decisions and congressional mandates have combined to weave a cloak of protection. Doctrines have developed which are sensitive to the special needs of the handicapped community. Rehabilitation Act of 1973 § 504, 29 USC § 794 (1973); 45 CFR § 84.1 (1977); Rehabilitation Act of 1973, Pub L No. 93-112, 87 Stat 355 (1973).

MANDATORY MINIMUM HEALTH AND SAFETY PROVISION

The June 29, 1990 order is unconstitutional because the Appellate Court was in error in letting stand the trial court's March 11, 1987 order permitting a mandatory minimum health and safety provision to be optional. The portion of the March 11, 1987 order not reversed and remanded with directions is contrary to law and to public policy. It is therefore a denial of due process of law.

The appellate court is permitting defendant 175 East Delaware Place Homeowners Association to:

> *"provide for hardware specified in finding C above and it will arrange and pay for the installation of such hardware on the windows of those owners willing to allow such installation."* (Emphasis added.)

Petitioner has been deprived of the protections of the minimum mandatory health and safety provisions of the City of Chicago Municipal Code. By this Court's permitting the individual unit owners the *option* of installing window hardware, the other occupants of the Hancock Center and Petitioner are exposed to danger. *The problem of pollution would not be corrected.* Additionally, the City of Chicago did not litigate the issue of the Association and Sudler & Company, its agent, turning off or reducing substantially the mechanical ventilation, which, without the required easily

operable windows, is the main way to protect against the pollutants generated in other parts of the building.

Unless Petitioner is allowed to attack the pollution in her apartment, generated from within and from other parts of the building, she has not been permitted to obtain the relief she sought in her complaint: her right to a healthful environment.

Petitioner's basic Federal and Illinois Constitutional Rights have been and are being denied.

Petitioner has alleged that the terms of the Illinois Appellate Court's order are discriminatory in its application, and are arbitrary and capricious, violating in practice the Equal Protection Clause of the Fourteenth Amendment.

The Appellate Court's June 29, 1990 order has stripped and deprived Petitioner of her basic rights and due process as a litigant. She now has fewer rights than a regular litigant, which was not the intent of the intervention statute. There is no reason or right to now apply any restrictions as is clearly set out in Section 2-408(f) of the intervention statute. She should be allowed to fully develop her case, not be limited to only the March 11, 1987 order about *"hardware."* That was not the single subject of her verified complaint.

Petitioner is forced back into the courtroom without the right to have defendants' answer filed in the case below; without time for discovery; to be ordered to go to trial with an unreal, unfair, time limitation; and, by defining another issue to be tried, will not give Petitioner the relief for which she intervened eight years ago.

This court's jurisdiction is invoked because of the discriminatory effect of the appellate court's remand, depriving Petitioner of due process, equal protection, and access to the courts.

The primary focus should be the results of the remand back to the trial court under the prejudicial circumstances and directions specified by the appellate court.

Petitioner is being placed on a *"merry-go-round."* The terms of the remand, ostensibly in Petitioner's *"favor"* encroach upon the ability of a trial judge to control his own docket. The Supreme Court of the United States was concerned about a *"merry-go-round"* in 39 Ill 2d 278, 284 quoting *Marino v Ragen* (1947), 332 US 561, 570, 92 Led 170, 176, 68 S Ct 240. This dealt with pursuing legitimate constitutional challenges to criminal convictions. Although Petitioner's case is civil, not criminal, (although housing court in Chicago is a quasi-criminal court) the concept is still applicable. Upon remand Petitioner is limited by the terms of the remand to litigate not her own complaint, filed in as required by law in accordance with the Illinois intervention statute, but to litigate just one small portion of her complaint. If the trial court denies the relief sought, Petitioner must again begin the entire appeal process all over, with the courts keeping Petitioner busy for another two or three years while her meager resources dwindle and the relief is ignored. This is not due process, it is a *"merry-go-round."*

"It is one of the oldest and perhaps the wisest maxims of equity that the law will not require a person to do a useless act." *Moehling v Pierce*, 3 Ill.2d 418, 121 NE2d 735, *Rock Island YWCA v Bestor* (1977), 48 Ill.App3d 761,765, 363 NE2d 413 at 416.

The Illinois Appellate Court has denied Petitioner the right to try the issue of environmental pollution and restricted the relief to that of the trial court's March 11,1987 order, which limited itself to only one aspect of the cause of the pollution; not the issue of uninhabitability.

It is a matter of record by court order entered on June 8, 1984 (1R C262) that:

> *"there has been no trial of the matters alleged in the Complaint as to the ventilation system, and that there have been no finding of fact or conclusion of law or adjudication made with respect to any matter alleged or arising out of the Complaint as to the ventilation system."*

If this is sustained, Petitioner would again have no meaningful intervention and the public should be warned that intervention is a costly and useless trap as pursued in the Illinois courts.

But more fundamentally, review is warranted to determine whether the Court below, by erecting artificial standards and barriers to relief, has effectively closed off the rights guaranteed by the Constitution. A full examination of Petitioner's charges would not be painless; but in the long run it would prove more health, and more consistent with our constitutional commitment to equal justice under law, than avoiding the problem by refusing to see it.

MEANINGFUL OPPORTUNITY TO BE HEARD

Due process requires that Petitioner receive the latitude given to litigants in compliance with the Supreme Court Rules to develop her case in a reasonable time. The time restrictions placed by the court are prohibitive and do not permit meaningful opportunity to be heard. Due process requires at a minimum that "*persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.*" *Boddie v Connecticut*, (1971) 401 US 371 at 377, 91 S Ct 790. This extends to municipal ordinance violations. See, *Williams v Oklahoma City*, 395 US 458. Municipal violations are part of appeal 87-1211.

EQUAL PROTECTION

Section 1 of the Fourteenth Amendment to the United States Constitution forbids any state from denying the equal protection of the laws to any person within its jurisdiction. Although the "*due process* clause of the Federal Constitution does not require a state to establish avenues of appellate review, the "*equal protection*" clause of the Federal

Constitution requires that once a state establishes avenues of appellate review,

> *"these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Rinaldi v Yaeger*, (1966) 384 US 305, and case cited therein.

The *Rinaldi* case was quoted from and followed with approval in *Williams v Oklahoma City*, (1969) 395 US 458; *North Carolina v Pearce*, (1969) 395 US 711; *Mayer v City of Chicago*, (1971) 404 US 189; *Blockledge v Perry* (1974) 417 US 21.

The prohibition against depriving a person of life, liberty or property without due process of law is so fundamental that it is deemed imperative. The due process clause embodies guarantees so all-encompassing that a brief statement of its effect is impossible and unnecessary. Petitioner continues to be deprived of the use of her property.

SUMMATION

The Appellate Court's *"directions"* make its order unworkable, with an impossibility of proceeding in the trial court under the terms established by that order, including a restriction of hearing only one portion of Petitioner's complaint. It is in violation of Petitioner's constitutional rights, due process and equal protection of the law. Petitioner's case has been destroyed. There is no way she can have an effective intervention or hearing under the terms laid out by the appellate court. These problems were identified in the petition for rehearing which the appellate court denied her leave to file *instanter* in spite of it being presented only three and one-half hours after the due date. That was during her husband's serious, documented physical collapse and concurrent dangerous gastrointestinal perforations in June and July 1990.

The order should be modified so that Petitioner is not deprived of and penalized by artificial time restraints not placed on attorneys or the trial court, and where the full relief she sought in her unanswered complaint can be realized.

Petitioner is entitled to a full and complete substantive and procedural due process proceeding: on her full complaint and her apartment, including the rights of amendment of her complaint.

The court should either grant Petitioner relief or remand the case for further consideration under appropriate legal standards. Only then will there be due process, equal protection under the law, and equal access to the courts.

CONCLUSION

Petitioner asks this Court issue its petition for a writ of certiorari to the Illinois Appellatee Court.

Supervisory Jurisdiction

In the alternative, Petitioner asks this court to exercise its supervisory jurisdiction to supervise the appellate court's conflicts and contradictions as committed in its opinion and remand order.

Summary "reversal"

In the alternative, Petitioner asks this court for a summary "reversal." The decision below is clearly wrong, not in reversing but in the terms of the reversal, by limiting Petitioner to only one part of her complaint, with serious time restrictions.

Respectfully submitted,

Joan P Whitmer, *Petitioner*
American Citizen on her own behalf
221 Pardridge Place, DeKalb IL 60115 815/758-7272

FIFTH DIVISION
29 JUNE 29, 1990

NO. 1-87-1211

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CITY OF CHICAGO, A Municipal Corporation Plaintiff and JOAN P WHITMER, Plaintiff-Intervenor-Appellant vs JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SUDLER & CO., and HOMEOWNERS ASSOCIATION, Defendants-Appellees	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 83 M1-404279 THE HON SIMON S PORTER JUDGE PRESIDING

ORDER

I

This case is now before us a second time. In our first opinion, we reversed the circuit court's judgment and remanded the cause, so that plaintiff-intervenor Joan P. Whitmer could intervene in building code violation litigation commenced by plaintiff City of Chicago against defendants John Hancock Mutual Life Insurance Company, Sudler & Company, and 175 East Delaware Homeowners Association.

Upon remand, the circuit court entered an order on March 11, 1987, in favor of the City and against defendants, from which Whitmer has appealed. For the following reasons, we have concluded that the case must be reversed and remanded again.

II

The facts of the case are set forth in our first opinion, and we shall only revisit them as necessary for an understanding of the issues presented by this appeal. The City filed a complaint against defendants on July 22, 1983, charging that the John Hancock Center did not meet the ventilation requirements of the Chicago Municipal Code. The City sought alternative relief, including fines, an injunction, the appointment of a receiver, or an order of demolition. On August 16, 1983, the date of the first hearing held in the case, Whitmer appeared and presented her petition to intervene, along with a complaint. Whitmer alleged that she was a condominium owner in the residential portion of the John Hancock Center, and that her health, safety, and property interests would be affected by the outcome of the case. Her complaint incorporated the municipal code violations identified by the City, and she sought declaratory and injunctive relief.

The City did not actively oppose Whitmer's petition, although it believed it adequately represented her health and safety interests. Defendants opposed the petition, arguing that Whitmer's property interest would be adequately represented by the Homeowners Association, and that her intervention would unduly delay the action. Whitmer responded that the City could not represent her particular health and safety interests, and that it had failed to pursue discovery. Regarding the Homeowners Association, she

replied that it could not represent her, as it denied the existence of violations, whereas she sought to have violations corrected. The circuit court denied Whitmer's petition, ruling that the City and the Homeowners Association would adequately represent her rights.

Whitmer appealed to this court. We found little merit in defendants' argument that allowing her intervention would unduly delay proceedings. Rather, we believed the crucial question was whether Whitmer's interests were adequately represented by the original parties. We answered this question in the negative, concluding that the representation of her interests by the City and the Homeowners Association would, or might be, inadequate. Since Whitmer's claim of inadequate representation was reasonable and well founded, and since the statutory requirements of timeliness and insufficiency of interest were met, we held that the circuit court erred in denying her petition to intervene. Accordingly, we reversed the circuit court's judgment and remanded the cause for further proceedings. See City of Chicago v. John Hancock Mutual Life Insurance Co. (1984), 127 Ill.App.3d 140, 468 N.E.2d 428.

The mandate of this court issued on March 22, 1985. Whitmer's attorneys, the law firm of Jenner & Block, moved for leave to withdraw on October 10, 1985. Notwithstanding her objections, the circuit court permitted Jenner & Block to withdraw. On November 13, 1985, Sidney Z. Karasik entered an appearance as counsel for Whitmer. On January 20, 1987, Judge Simon Porter entered an order, reflecting the fact that Karasik would be withdrawn. Whitmer claims she was not given proper notice of his withdrawal. In any event, the circuit court gave her only one week -- until January 27, 1987 -- to retain new counsel.

On March 11, 1987, a trial was held to resolve certain questions left undetermined by earlier rulings. One such ruling was issued on November 17, 1984. This order recited that the City's municipal code required carbon monoxide levels of less than 100 parts per million; therefore, Judge Porter ordered John Hancock to add four monitoring points in the John Hancock Center's garage, and to lower the level of its carbon monoxide alarms to 35 ppm. Judge Porter entered another order on May 29, 1984, ruling in favor of the Homeowners Association, to the extent that the windows in the John Hancock Center's residential portion were openable and satisfied the five percent natural ventilation requirement of the municipal code; Judge Porter also ruled in favor of the City, in that he found the windows lacked hardware which would permit them to be opened. The March 11, 1987, trial was held to determine what sort of hardware would allow the windows to meet the municipal code's requirements.

On March 11, 1987, immediately before trial, Whitmer moved for a continuance, based upon the fact that she was hearing impaired and, consequently, had difficulty retaining new counsel. The circuit court denied her request; thus, she was forced to proceed pro se. Whitmer went on to raise other objections. On the basis of Illinois Supreme Court Rule 220 (107 Ill.2d R. 220), Whitmer succeeded in getting the circuit court to disallow one of the defendants' witnesses, because discovery regarding that witness was not completed within 60 days before trial. Whitmer further objected that the circuit court had not truly recognized her intervention on demand, contrary to the mandate of this court. The circuit court, however, permitted defendants to proceed. Whitmer entered a standing objection to any additional proceedings, and to any evidence that defendants might introduce.

Defendants called Richard E. Lenke, an architect for the firm that designed the John Hancock Center. Lenke testified, on cross-examination by the City, that the proposed window hardware satisfied the municipal code's ventilation requirements. Whitmer was given the opportunity to question Lenke, which she declined. Defendants then introduced the videotape of Charles Beason's evidence deposition, and it was played to the court. Beason, an engineer employed by the manufacturer of the proposed window hardware, stated that the hardware would hold the residential windows open. The City stated that it would be content if the proposed hardware met the requirements of its municipal code.

After the trial of March 11, 1987, an order was drafted, and approved by the circuit court, which stated that the proposed hardware would cause the windows of the John Hancock Center to satisfy the municipal code's natural ventilation requirements. The order also recited that the Homeowners Association would provide the hardware and arrange and pay for its installation on the windows of those individual unit owners willing to allow it. Thus, the circuit court entered judgment in the City's favor. The circuit court ruled that the order was final and appealable, including a finding pursuant to Supreme Court Rule 304(a) (107 Ill.2d R. 304 (a)), and retained jurisdiction to supervise compliance with the order's terms. Whitmer now appeals from the March 11, 1987, order, among others.

III

Before turning to the merits of the case, we must review its procedural history in this court. Two oral arguments have been held. The first argument was held on September 5, 1989; it concerned defendants' motion to dismiss appeal

number 89-0431, one of several appeals filed by Whitmer. She decided to appeal from virtually every ruling made below, in order to protect her rights. Following this argument, we dismissed appeal number 89-0431 and narrowed the issue in appeal number 87-1211 solely to the propriety of the March 11, 1987, order, in which the circuit court approved the proposed window hardware.

The second oral argument in this appeal was held on February 27, 1990. Whitmer argued pro se, as she did on September 5, 1989. And, as before, we permitted her to use special equipment, which allows persons with hearing disabilities to participate more fully in appellate court proceedings. Presiding Justice Coccia read the following statement into the record:

> "Mrs. Whitmer, before you begin, I would like to take a moment to explain to you why this court denied your most recent request for an extension of time on February 15 [1990]. This court is aware of your special circumstances: the fact that you are proceeding pro se, and that you claim to be hearing impaired. This court has sought to accommodate you. Your appeal has been pending for nearly three years. During that period, this court has granted you approximately 20 extensions of time. Your oral argument today is the second in appeal number 87-1211, and your third overall. As in the past, we have allowed you to proceed with special equipment.
>
> But we must balance your needs as an individual litigant with the needs of the entire system, including the right of your fellow citizens to our attention. With these concerns in mind we entered an order on December 11 of last year [1989], more than two months ago, setting a briefing schedule and designating today as the date for oral

argument. The time has come for us to rule on the merits. Thus, this court came to the conclusion that justice would not be served by allowing yet another extension. We trust this court has struck a proper balance between your right to be heard, and the right of other litigants to our attention. Please tell us, precisely and succinctly, the exact relief you want from this court."

Resolution of this appeal has been complicated by other factors. For example, Whitmer filed her brief late, and it contains an argumentative statement of facts, contrary to the rules of our supreme court. (See 113 Ill.2d R. 341 (e)(6).) More egregiously, counsel for defendants -- Burke, Wilson & McIvaine (sic) and Phelan, Pope & John, Ltd. -- filed a joint brief that lacks citations to the voluminous record. (See 113 Ill.2d R. 341(e)(6), (7), 341 (f).) Whitmer's noncompliance with the rules is arguably excusable, since she is proceeding pro se. But we cannot excuse the noncompliance of two sizable and experienced law firms.

With these irregularities in mind, we turn now to the merits of this appeal. Whitmer argues that she has been deprived of her constitutional rights; that the circuit court on remand prevented her intervention as of right; and that the order she appeals from is not final -- a curious point for an appellant to urge on review. Defendants reply that the March 11, 1987, order is final and appealable; that Judge Porter's findings were not against the manifest weight of the evidence; and that Whitmer was given full intervention rights.

We conclude that the March 11, 1987, order was final and appealable, because it fully and finally disposed of the parties' rights so that no material controverted issue remained to be determined. (See AFSCME v. State of Illinois (1989),

192 Ill.App.3d 108, 111, 548 N.E.2d 592, 594.) The real issue before us concerns Whitmer's theory that the circuit court prevented her intervention in the litigation on remand. In support of her theory she notes that, among other things, defendants never answered her compliant and that she was unable to get her motion to default them heard. Section 2-408(f) of the Illinois Code of Civil Procedure provides:

> "An intervenor shall have all the rights of an original party, except that the court may in its order allowing intervention, whether discretionary or a matter of right, provide that the applicant shall be bound by orders or judgments, theretofore entered or by evidence theretofore received, that the applicant shall not raise issues which might more properly have been raised at an earlier stage of the proceeding, that the applicant shall not raise new issues or add new parties, or that in other respects the applicant shall not interfere with the control of the litigation, as justice and the avoidance of undue delay may require." Ill. Rev. Stat. 1983, ch. 110, par. 2-408(f).

Once this court recognized Whitmer's right to intervene, it was incumbent upon the circuit court to follow our mandate and allow her to participate fully in the case on remand. Whitmer brought her hearing disability to the circuit court's attention before the March 11, 1987, trial, as stated above. (In this court, Whitmer has filed an affidavit executed by a physician, documenting her handicap.) But the circuit court permitted Whitmer only one week to retain new counsel. Given Whitmer's disability and the complexity of the case, we must conclude that the circuit court abused its discretion by allowing her only one week to retain new counsel. We do not wish to be understood as holding that Whitmer had a constitutional right to counsel that the circuit court somehow violated. Instead, we think that because of her disability she

needed counsel in order to meaningfully exercise her statutory right to intervention at the trial of March 11, 1987.

Because Whitmer was effectively denied the right by the circuit court, we must reverse its order of March 11, 1987, and remand the cause for a hearing on the merits of her complaint, which have not been addressed previously. As we express no opinion regarding the merits of the March 11, 1987, order, and as her complaint incorporates the municipal code violations identified by the City in its complaint, the circuit court is free to conclude that she is entitled only to the relief awarded on March 11, 1987, or such other relief that the court deems just. The circuit court may consider whatever evidence it deems relevant, whether introduced by Whitmer or defendants, keeping in mind section 2-408(f)'s mandate that intervention be consistent with justice yet not cause undue delay.

Upon remand, the circuit court shall also permit Whitmer 35 day to retain new counsel. (This actually gives her at least 56 days, as our mandate will issue no earlier than 21 days after entry of judgment (see 107 Ill.2d R. 368(a).) The evidentiary hearing shall be held 35 days thereafter. If Whitmer elects not to retain counsel, or she fails to retain counsel within the time permitted, the circuit court shall allow her to proceed at the hearing with whatever assistance or equipment permits her to participate in spite of her disability, as long as such arrangements are consistent with orderly trial procedure. Whitmer has not claimed indigence, and she must proceed at her own expense on remand.

IV

For the reasons stated, then, the order of March 11, 1987, is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED, WITH DIRECTIONS.

COCCIA, P.J., with LORENZ and MURRAY, JJ., concurring.

Supreme Court, U.S.
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JUN 21 1991
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No. 90-1809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOAN P. WHITMER,
Petitioner,

v.

CITY OF CHICAGO, a Municipal Corporation, JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SUDLER & CO., and HOMEOWNERS ASSOCIATION,
Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court of Illinois, First Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS FOR REVIEW

Whether petitioner may seek relief from an otherwise non-reviewable order by raising unsubstantiated claims of federal constitutional violations by the state appellate court in its review process.

Whether the Illinois Appellate Court's order, reversing and remanding with directions, violated petitioner's constitutional rights to due process, equal protection and access to the courts.

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Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court of Illinois, First Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

The Petition for Writ of Certiorari does not present this Court with any jurisdictional basis for review of the claims raised by petitioner. Petitioner has not challenged as unconstitutional any state statute, nor has she demonstrated a "title, right, privilege, or immunity under the Constitution" pursuant to 28 U.S.C. § 1257(a) (1988). In addition,

the state appellate court did not decide a federal question conflicting with another state court of last resort or with a Federal Court of Appeals so as to invite review under Supreme Court Rule 10.1(b). Finally, the state appellate court did not decide either an important, unsettled question of federal law or a federal question in a way which conflicts with this Court's decisions. Sup. Ct. R. 10.1(c). *See Henry v. Mississippi*, 379 U.S. 443, *reh'g denied*, 380 U.S. 926 (1965) (denying review of state court decision grounded solely in state law practice and procedure).

STATEMENT OF THE CASE

Petitioner Joan P. Whitmer ("petitioner" or "Whitmer") and her husband purchased a condominium on the 85th floor of the John Hancock Center, located in Chicago, Illinois, on or about February 28, 1977.[1] (R. C-28h.) The City of Chicago originally brought this state court action in the Circuit Court of Cook County ("Circuit Court") on July 22, 1983 alleging violations of the city building code, *City of Chicago v. John Hancock Mutual Ins. Co., Sudler & Co., and Homeowners Association*, No. 83 M1 404279. (R. C-2.) Petitioner appeared at the first hearing in the case on August 16, 1983. (R. C-15.)

[1] Petitioner's statement of the case omits and mischaracterizes much of the procedural history in this action and is replete with evidentiary allegations that have no basis in the record. Therefore, respondents present this Court with a short summary of the history of this case.

On September 13, 1983, Whitmer presented a petition for leave to intervene. (R. C-134.) During the hearing on her petition in the Circuit Court, Whitmer stated that she would be prepared for trial on October 11, 1983, if her petition was granted. (R. Vol. VI, Tab Sept. 13, 1983, at 13-14.) The Circuit Court, however, denied her petition for leave to intervene and petitioner appealed. (R. C-135.) At no time did petitioner seek a stay of the proceedings pending resolution of her appeal even though petitioner was aware of the fact that the case was proceeding while her appeal was pending. (R. C-207.)

On August 17, 1984, the First Judicial District of the Appellate Court of Illinois ("Appellate Court") held that the Circuit Court erred in denying Whitmer's petition for leave to intervene, and remanded the cause for further proceedings. *City of Chicago v. John Hancock Mutual Life Ins. Co.*, 127 Ill. App. 3d 140, 468 N.E.2d 428, 432-34 (1st Dist. 1984). In March, 1985, petitioner intervened in that lawsuit.

While Whitmer's appeal was pending, the City of Chicago proceeded to prosecute its complaint in an orderly fashion. For example, on May 29, 1984, the Court determined that while the windows of the residential or condominium portion of the John Hancock Center (approximately floors 44 through 92) were operable, they were not easily operable as required by the Building Code. (R. C-254 to C-255, C-268, C-261 [sic].) Having made that determination, the Court scheduled the matter for a hearing to determine the type of window hardware which would make the windows easily operable. The actual hearing on that matter was not held until March 11, 1987.

At the time of the Circuit Court's determination that the windows were not easily operable and at all times from when she first attempted to intervene on August

16, 1983, until the Circuit Court permitted successor counsel to withdraw on January 27, 1987, petitioner was represented by counsel. (R. C-15, C-279, C-287, C-317 to C-318, C-319.) During this time, counsel for petitioner took no action to stay the Circuit Court proceedings pending resolution of the intervention issue on appeal or, upon the order to allow intervention, to vacate or appeal any of the orders entered prior to Whitmer's intervention. In addition, the March 11, 1987 hearing, on the question of the type of window hardware, did not occur until more than sixty (60) days after Whitmer was given leave to retain new counsel on January 20, 1987. (R. Vol. VI, Tab Mar. 11, 1987.) On March 11, 1987 the Circuit Court held a hearing on those issues remaining open from earlier rulings, received testimony and demonstrative evidence, permitted the cross-examination of witnesses, and entered an order approving a type of window hardware for use in the John Hancock Center. (R. C-376 to C-378.)

Petitioner appealed this March 11, 1987 order ("Circuit Court Order") to the Illinois Appellate Court.[2] The Appellate Court reversed and remanded the Circuit Court Order, holding:

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[2] The resulting order pursuant to Illinois Supreme Court Rule 23 is attached to the Petition for Writ of Certiorari as Appendix B. Citations to the Appellate Court Order are hereinafter referred to as "B-#". An appeal may be disposed of under Illinois Supreme Court Rule 23 where the case does not (1) involve "an important new legal issue or [modify] or [question] an existing rule of law"; (2) consider "a conflict or apparent conflict of authority within the appellate court"; (3) offer a "decision of substantial public interest"; or (4) offer an opinion which is "a significant contribution to legal literature." If a party has reasons to support the change in designation from a Rule 23 order to a published decision, it may move the panel for publication.

> [T]he circuit court permitted Whitmer only one week to retain new counsel. Given Whitmer's disability and the complexity of the case, we must conclude that the circuit court abused its discretion by allowing her only one week to retain new counsel.

Appellate Court Order, at B-8. The Appellate Court noted that Whitmer's last attorney withdrew in January, 1987 and the Circuit Court had provided Whitmer with a one week period in which to retain an attorney. *Id.* at B-9 to B-10. The Appellate Court stated:

> We do not wish to be understood as holding that Whitmer had a constitutional right to counsel that the circuit court somehow violated. Instead, we think that because of her disability she needed counsel in order to meaningfully exercise her statutory right to intervention at the trial of March 11, 1987.

Id. at B-8 to B-9. Accordingly, the Appellate Court remanded the case for a new hearing, directing that the Circuit Court "permit Whitmer 35 day [sic] to retain new counsel" and that an evidentiary hearing proceed 35 days thereafter. *Id.* at B-9.

Following the entry of the Illinois Appellate Court's order, petitioner attempted to seek a rehearing. She did not file her Petition for Rehearing within the time set by the rules. Rather, she filed a Motion to Extend Time to File Petition for Rehearing on a Friday, and then attempted to file her Petition for Rehearing the next Monday, July 23, 1990. Petition, at 9. On August 16, 1990, the Appellate Court denied Whitmer's Motion to Extend Time to File Petition for Rehearing. Whitmer then filed a petition for leave to appeal in the Supreme Court of Illinois on or about October 11, 1990. The Illinois Supreme Court denied that petition on December 4, 1990, and peti-

tioner filed her Petition for Writ of Certiorari in this Court on May 3, 1991.[3]

SUMMARY OF ARGUMENT

Petitioner does not challenge the Circuit Court Order from which her appeal originally emanated, rather she now petitions for review of the subsequent Appellate Court Order which ruled in her favor, reversing the Circuit Court Order and remanding with directions. The basis for the petition is alleged potential violations of due process in the Appellate Court's remand with directions. Petitioner's proper recourse is to return to the Circuit Court, raise and be heard on her objections in the first instance,

[3] This Court should take judicial notice of the pendency in the federal court system of a case entitled *Frank L. and Joan P. Whitmer v. John Hancock Mutual Life Ins. Co., et al.*, Case No. 89 C 8341. *See E.I. DuPont de Nemours & Co., Inc. v. Cullen*, 791 F.2d 5 (1st Cir. 1986) (court of appeals could take judicial notice of complaint filed in state court action where undisputedly authentic copy appended to party's brief). On February 3, 1988, petitioner and her husband filed their First Amended Complaint against respondents and others in the Western Division of the United States District Court for the Northern District of Illinois (the "Federal action"). Respondents lodged with the Clerk of Court a true and correct copy of the Complaint. The Complaint alleged violations of RICO, the Civil Rights Act, as well as numerous pendent state law claims which were raised in this state court action. At pages 2-3 of her petition, under the section entitled "Constitutional and Statutory Provisions Involved," petitioner cites the Fifth and Fourteenth Amendments as the legal basis for her petition and the actions of the Seventh Circuit, in the Federal litigation, as the factual basis for assertion of jurisdiction. Actions of a federal court, in an unrelated action, cannot provide a basis for review by Writ of Certiorari of a state court decision.

and allow the Circuit Court to alleviate any objections that are just. Furthermore, petitioner's contention that the Appellate Court Order did, in fact, violate her federal constitutional rights must be rejected because the record reflects that the Appellate Court afforded her a full and fair hearing and accommodated her status as a *pro se*, allegedly hearing impaired litigant. Therefore, this Court should deny the Petition.

ARGUMENT

A.

PETITIONER MAY NOT SEEK RELIEF FROM AN OTHERWISE NON-REVIEWABLE ORDER BY RAISING UNSUBSTANTIATED CLAIMS OF FEDERAL CONSTITUTIONAL VIOLATIONS BY THE STATE APPELLATE COURT IN ITS REVIEW PROCESS.

In the Petition for Writ of Certiorari, Whitmer seeks relief from the Appellate Court Order. Unlike the usual appeal, Whitmer does not direct her attack to the Circuit Court Order from which her appeal originally emanated. Rather, petitioner now claims that the Appellate Court's order, remanding the case with directions, violates her rights to due process of law.

1. The Appellate Court Order Was Based Solely On State Law Practice And Procedure.

The Appellate Court's reversal of the Circuit Court Order was predicated on the determination that under all of the circumstances the trial court had abused its discretion by permitting Whitmer only one week to retain new

counsel. Appellate Court Order, at B-8. Generally, this Court will not review state court decisions grounded in state law, particularly questions of state practice and procedure. *Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6 (1980) (objection to state court's application of state law does not raise federal question appropriate for review by this Court). The original appeal and the Appellate Court's treatment of that appeal clearly are matters of state law.

Whitmer asserts that the Appellate Court Order improperly restricts her intervention rights under Section 2-408 of the Illinois Code of Civil Procedure. Ill. Rev. Stat. ch. 110, ¶¶ 1-101 *et seq.* (1982). Section 2-408 authorizes permissive intervention and intervention as of right. Ill. Rev. Stat. ch. 110, ¶ 2-408 (1982). Intervention serves a state law purpose of expediting litigation by disposing of an entire controversy among parties involved in a single action and by preventing a multiplicity of actions. *Bishop v. Village of Brookfield*, 99 Ill. App. 3d 483, 425 N.E.2d 1113 (1st Dist. 1981). Intervention, however, is not an independent proceeding but an ancillary and supplemental one which is subordinate to the main proceeding. *People ex rel. Scott v. Illinois Protestant Children's Home, Inc.*, 95 Ill. App. 3d 552, 420 N.E.2d 448 (1st Dist. 1981).

In the earlier Appellate Court decision reversing the Circuit Court's denial of Whitmer's petition to intervene, the court held that Whitmer was entitled to intervene and remanded the cause for that purpose. In the subsequent appeal, the Appellate Court determined that the Circuit Court denied Whitmer's ability to participate fully as an intervenor by limiting her time to retain new counsel prior to the final court hearing. Whitmer does not challenge the reversal of the Circuit Court Order and the remand of the case. Rather, she challenges the refusal of the Ap-

pellate Court to grant her demand that all orders in this case going back to September 13, 1983 be vacated and the Appellate Court's instructions that she proceed in a timely fashion on remand. Petition, at 11. Petitioner now attempts to elevate the Appellate Court's instructions for future proceedings into a denial of due process, in order to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a) (1988).

Whitmer then argues that the Appellate Court Order improperly restricts her intervention rights under Section 2-408(f), because, in petitioner's words, the Appellate Court previously ordered her intervention "as of right without any restriction." *See* Petition, at 6. Whether or not the decision can be construed so broadly, the subsequent order of the same Appellate Court is a matter of application of the state law of intervention. As such, it is proper for the state reviewing court to give guidance to a lower court on remand.

Whitmer must return to the state trial court and proceed with the merits of her case. At that time, Whitmer can raise and be heard on any objection she may have, and the Circuit Court may well be able to craft a means of alleviating any complaint that is just. Petitioner's claims here amount to an attempt to get a prior adjudication from this Court of matters which have not yet occurred. She is asking this Court to grant relief from an alleged violation of due process that has not—and likely will not—happen. The directions to the Circuit Court have not been implemented. Thus, no issue of whether those directions, in fact, caused any justiciable harm to Whitmer is ripe for this Court's determination. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 734-35, *reh'g denied*, 439 U.S. 883 (1978) (courts are loathe to issue advisory opinions).

2. Whitmer Cannot Multiply Issues On Appeal In Order To Create A Federal Question To Invoke This Court's Jurisdiction.

In Illinois, when a reviewing court reverses and remands an order with specific instructions as to the actions to be taken by the trial court, the question properly presented on a subsequent appeal is whether the trial court followed the appellate court's mandate. *Yonan v. Oak Park Federal Sav. & Loan Ass'n*, 27 Ill. App. 3d 967, 326 N.E.2d 773 (1st Dist. 1975). The Appellate Court Order determined that the Circuit Court Order violated its original mandate by overly limiting Whitmer's time to retain counsel. Thus, the only issue subject to review by the Appellate Court was whether the Circuit Court abused its discretion in applying the intervention statute. However, that is not the issue framed by the petitioner.

Instead, petitioner's contention, that the Appellate Court Order when implemented on remand will violate her federal constitutional rights, raises issues which require an evidentiary hearing in the first instance in this Court as to what may occur in the future. *See Cardinale v. Louisiana*, 394 U.S. 437 (1969) (maintaining that this Court will not decide federal constitutional issues raised before it for first time on review of state court decisions); *Edelman v. California*, 344 U.S. 357 (1953) (holding the Court without power to review federal constitutional issues raised for first time on review).

The petition is fraught with allegations that the Appellate Court Order violated petitioner's right to due process, equal protection and access to the courts. Although this Court may review a state court decision wherein the petitioner demonstrates that the state violated her federal constitutional rights, this Court has declined to review

claims of federal constitutional violations which are frivolous or fail to meet the requisite threshold of significance.[4] *See Williamson v. Hopewell Redev. & Housing Auth.*, 371 U.S. 234 (1963) (dismissing appeal for want of substantial federal question); *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952) (dismissing appeal for failure to raise substantial federal question where appellants argued state statute and order thereunder violated due process and equal protection rights). Mere allegations of due process violations are insufficient to carry petitioner's burden of showing affirmatively that this Court has jurisdiction. *Dep't of Mental Hygiene v. Kirchner*, 380 U.S. 194, 197 (1965) (expressing reluctance to assume jurisdiction of case from state court unless clear that federal question is necessarily presented). Petitioner has not presented facts that clearly demonstrate that the Appellate Court infringed upon her right to due process. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986) (indicating that mere allegations of due process violations insufficient to invoke Court's jurisdiction).

Petitioner alleges that the trial schedule set by the Appellate Court violates her right to due process. *See* Petition, at 12-15, 18-19, 21-23, 26 & 28. A trial schedule is a discretionary matter for trial courts, both state and federal, in managing their dockets and expediting the final

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[4] Petitioner also seeks relief under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.* (1973), on the ground that the Appellate Court Order discriminates against her on the basis of her disability. This is another allegation that has no basis in the record. In fact, the Appellate Court allowed petitioner to proceed at hearings with special equipment. Appellate Court Order, at B-6. Moreover, petitioner is raising an issue which would require a premature evidentiary hearing in the first instance in the reviewing court.

resolution of claims. *See Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972) (stating that Supreme Court's function is not to manage affairs of state courts but only to make clear federal constitutional requirements). Furthermore, the trial court has significant discretion, even on the scheduled remand, to provide any relief to Whitmer that justice may require. *See, e.g.*, Ill. Sup. Ct. R. 183 (1991) (governing extensions of time).

Additionally, until the petitioner can present facts demonstrating that the trial schedule on remand actually denied her rights to due process of law, review by this Court would be premature. Federal courts are not empowered to issue advisory opinions, *FCC v. Pacifica Foundation*, 438 U.S. 726, 734-35, *reh'g denied*, 439 U.S. 883 (1978), and will not render an opinion on claims not reduced to judgment by a trial court. *Hales v. Green Colonial, Inc.*, 490 F.2d 1015, 1017 n.3 (8th Cir. 1974).

Contrary to petitioner's assertions, the Appellate Court accommodated her at every turn: it granted her 20 extensions of time; allowed her to proceed with special equipment during a number of oral arguments; and gave her an opportunity to litigate the merits underlying the Circuit Court Order with the assistance of counsel.[5] Appellate Court Order, at B-6 to B-7. Despite the fact that petitioner raises claims of potential due process violations, she does not cite any authority—or any facts—to support her contention that the Appellate Court Order constitutes a present violation of her constitutional rights. Therefore, this Court should deny the Petition for Writ of Certiorari.

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[5] Petitioner still has not retained new counsel of record nearly one year after issuance of the Appellate Court's mandate.

B.

THE ILLINOIS APPELLATE COURT ORDER DOES NOT VIOLATE PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS.

Whitmer was represented by counsel from the time of her intervention until just two months prior to entry of the Circuit Court Order (March 11, 1987).[6] The various strategic decisions made by Whitmer with the advice of her attorneys during the 3-1/2 years she was represented by counsel cannot now be disavowed by Whitmer because she is not satisfied with the outcome. All orders entered by the Circuit Court and Appellate Court prior to January, 1987 are equally binding on Whitmer. Whitmer's decisions with the advice of her attorneys to forego discovery, not to seek a stay in the Circuit Court proceedings pending Whitmer's appeal of the Circuit Court's denial of her intervention, not to file an amended complaint, not to timely initiate the other steps that petitioner now seeks, or not to timely appeal prior orders, do not entitle her to reopen and relitigate matters decided prior to January, 1987.

The Appellate Court Order properly permits Whitmer to readdress only that ruling made when she was without legal representation, namely the Circuit Court Order. The Appellate Court, in vacating the Circuit Court Order and remanding the case to the Circuit Court for additional proceedings, granted to Whitmer all the relief it could for those matters then properly before the Appellate Court. *See Yonan v. Oak Park Federal Sav. & Loan Ass'n*, 27 Ill. App. 3d 967, 326 N.E.2d 773 (1st Dist. 1975) (question properly presented on subsequent appeal is whether

[6] The March 11, 1987 hearing did not occur until more than sixty days after petitioner was given leave to retain new counsel.

trial court followed appellate court mandate). The various orders that were entered prior to the Circuit Court Order, which Whitmer now seeks to challenge, are final orders from which a timely appeal has not been taken and with respect to which the time to appeal long since has expired.[7] Due process for all litigants requires that courts not vacate valid and final orders from which no timely appeal was taken. *See Manis v. Sterling*, 862 F.2d 679 (8th Cir. 1988) (court of appeals lacks power to extend time for filing motion to file untimely appeal); *Needham v. White Laboratories, Inc.*, 639 F.2d 394 (7th Cir.), *cert. denied*, 454 U.S. 927 (1981) (holding that court of appeals lacks jurisdiction over appeal if notice of appeal not timely filed). Accordingly, this Court should deny Whitmer's Petition for Writ of Certiorari.

1. The Appellate Court Order Affords Petitioner A Full And Fair Opportunity To Argue The Merits Of Her Case On Remand To The Circuit Court.

The Appellate Court Order specifically provides for remand to the Circuit Court "for a hearing on the merits of her complaint, which have not been addressed previously," *i.e.*, while Whitmer was fully represented by an attorney. Appellate Court Order, at B-9. The Appellate Court Order goes on to provide that "[t]he circuit court may consider whatever evidence it deems relevant. . . ." *Id.* The Appellate Court Order, therefore, does not restrict the evidence. Indeed, the Appellate Court Order specifical-

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[7] For example, the Appellate Court, in an order dated September 24, 1987, dismissed as untimely Whitmer's efforts to belatedly appeal final orders dated January 11, 1984, May 20, 1984, and May 29, 1984. Whitmer has not challenged those dismissals here or in any other reviewing court. *See* Appellate Court Order, at B-6.

ly permits a contest of those matters raised in Whitmer's complaint and not previously decided.

Consistent with the dictates of Ill. Rev. Stat. ch. 110, ¶ 2-408(f), Whitmer is bound by the record of the case at the time of intervention, and she cannot change the issues for her own purposes. *Home Ins. Co., Inc. v. Lorelei Restaurant Co., Inc.*, 83 Ill. App. 3d 1083, 404 N.E.2d 895, 898 (1st Dist. 1980) (intervenor cannot change proceedings by introducing new matters not relevant or which unduly complicate it). Specifically, Whitmer does not have the right to turn this straight-forward building code violation case into wide-ranging environmental litigation based on alleged rights and claims personal to Whitmer.[8] Rather, she is confined to presentation of her particular interest in the underlying action, *i.e.*, the suit by the City of Chicago regarding window ventilation. Contrary to Whitmer's assertions, such relief is completely consistent with the requirements of due process.

Furthermore, petitioner has raised in this Court a new contention in regard to the timing of discovery on remand. Petitioner also implies that the state courts denied her discovery. This is simply not true. Whitmer had two years

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[8] The Federal action filed by Mrs. Whitmer and her husband assert the same environmental claims which Whitmer repeatedly has attempted to raise in her appeals of the Circuit Court Order. The Federal action, rather than this proceeding commenced by the City of Chicago on window ventilation requirements, provides the avenue through which Whitmer may assert any environmental claims that she believes possess merit. Thus, the Appellate Court's refusal to permit Whitmer to litigate her environmental claims in the instant action is not prejudicial to Whitmer in any manner. The availability of the federal forum, coupled with the fact that the instant petition does not fall within that class of petitions for which this Court ordinarily grants certiorari, *see* Supreme Court Rule 10.1 (1991), adequately supports a denial of Whitmer's Petition.

after the Appellate Court allowed her intervention to take discovery. During most of that time period, Whitmer was represented by counsel. (R. C-15 to C-287.) Whitmer is bound by her prior decision, while represented by attorneys, not to conduct discovery.

On remand, if discovery is indeed necessary to resolution of those issues remaining, the trial court is armed with procedural means to timely resolve discovery issues. The time frames set forth in the Illinois Supreme Court Rules governing discovery provide guidelines for the expeditious and orderly resolution of claims. *See* Ill. Sup. Ct. R. 183 (1991) (for good cause shown, court may extend time for "doing of any act which is required . . . to be done within a limited period"); Ill. Sup. Ct. R. 201(c) (1991) (court may alter discovery rules to prevent injustice). The Circuit Court can also shorten the time for response to discovery. *Id.* If petitioner finds the timing in those Rules to be too long or too short, she can move the court for relief based upon then existing factual circumstances. Until such issues are presented to the Circuit Court and a decision is made by the trial court there is no issue for this or any other court to review.

2. Petitioner Received A Full And Fair Hearing In The Appellate Court.

Whitmer has challenged, on various federal and state constitutional and statutory grounds, the Appellate Court's resolution, in her favor, of her appeal. As noted in the Appellate Court Order, the Appellate Court permitted the appeal to pend for "nearly three years," because Whitmer requested and the Appellate Court granted "approximately 20 extensions of time." Appellate Court Order, at B-6.

The Appellate Court granted Whitmer the unusual opportunity to have lengthy oral argument on motions, and "to proceed with special equipment" due to her "claim to be hearing impaired." *Id.* Whitmer was accorded a full hearing of her claims. The record conclusively demonstrates that the Appellate Court has denied Whitmer no procedural or substantive right.

Whitmer should not be permitted to further delay the resolution of this building code action. The underlying action involves window hardware, not the matters upon which Whitmer seeks to have this Court rule. Indeed, Whitmer's actions here with respect to her own personal claims (claims which, as discussed above, are fully set out in her Federal action), do no more than unnecessarily delay resolution of the matter for all the current residents of the John Hancock Center and the 175 East Delaware Place Homeowners Association.

CONCLUSION

The Appellate Court Order provides Whitmer, on remand in the Circuit Court, every opportunity to present evidence in support of her pending claim. It is the Circuit Court of Cook County, and not the United States

Supreme Court, that should hear this evidence. For the reasons stated herein, this Court should deny Whitmer's Petition for Writ of Certiorari.

Respectfully submitted,

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